

JAN 19 2016

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 14-0813

Client MT Well

File 67122-002

THE CLARK FORK COALITION, a non-profit organization with senior water rights;  
KATRIN CHANDLER, an individual with senior water rights; BETTY J. LANNEN, an  
individual with senior water rights; POLLY REX, an individual with senior water rights; and  
JOSEPH MILLER, an individual with senior water rights,

Petitioners/Appellees,

v.

JOHN E. TUBBS, in his capacity as Director of the Montana Department of Natural  
Resources and Conservation and THE MONTANA DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION, an executive branch agency of the State of  
Montana,

Respondents,

v.

MONTANA WELL DRILLERS ASSOCIATION,

Intervenors/Appellants,

v.

MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING INDUSTRY  
ASSOCIATION,

Intervenors/Appellants,

v.

MOUNTAIN WATER COMPANY,

Intervenor/Appellee.

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On Appeal from Montana First Judicial District Court, Lewis and Clark County, Cause No.  
BDV-2010-874, Hon. Jeffrey Sherlock, District Judge

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BRIEF OF PETITIONERS/APPELLEES THE CLARK FORK COALITION ET AL.

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**ANSWER BRIEF OF THE CLARK FORK COALITION ET AL.**

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legislature added the “combined appropriation” provision to the Water Use Act in 1987. *See* AR 7 at 1 (the Department’s 1987 rule defining “combined appropriation”).<sup>1</sup> In 1993, however, and for yet-to-be understood reasons, *see* AR 7 at 3-4, the Department narrowly defined “combined appropriation” as an appropriation from groundwater developments that are “physically manifold” or plumbed together. 36.12.101(13), ARM.

The Clark Fork Coalition and four ranchers with senior water rights (“the Coalition”) formally petitioned the Department for a declaratory ruling and an amendment of the 1993 rule. AR 1 at 1. The Coalition’s petition explained that the 1993 rule allowed large consumptive water users to evade permitting and impact senior rights holders by simply drilling multiple, unconnected wells for a single large use. *See id.* at 18-28. The Coalition’s petition was supported by the Department’s sister agency, the Montana Department of Fish Wildlife and Parks (MFWP), as well as by Missoula County, the Mountain Water Company, the Brown Cattle Co., Cottonwood Environmental Law Center, Northern Plains Resource Council, Richard Hixson (Bozeman’s City Engineer), Stillwater Protective Association, the Tongue River Water Users’ Association, Mary Jane Alstad, Trout Unlimited, and fourteen individual ranchers with senior water rights.

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<sup>1</sup> Citations to documents included in the administrative record (AR) are given as [Tab #] at [Page #]. Citations to documents included in the District Court record are given as Doc. [Document #] at [Page #].

and (b) the 1993 rule defining “combined appropriation” needed to be amended, broadened, and updated through rulemaking. *Id.* at 2. The Department committed to adopting a new rule that would be “broader than and not limited solely to wells or developed springs that are physically manifold or connected together.” *Id.* at ¶ 2.

The stipulated agreement ultimately fell apart after two attempts at rulemaking by the Department failed. *See* Doc. 13 at Exhibit E. After the Department informed the Coalition that it would no longer pursue rulemaking to broaden the definition of “combined appropriation,” as agreed to in the stipulated agreement, the Coalition filed an unopposed motion to withdraw the agreement and re-open the case, which the district court granted. Docs. 13 and 14. The Parties then briefed the petition for judicial review on the merits.

A hearing was held on September 23, 2014, and, on October 17, 2014, the district court issued an order declaring that the Department’s rule defining “combined appropriation” conflicts with the Water Use Act. Doc. 53 at 13. The district court invalidated the rule, ordered the Department to conduct further rulemaking, and, in the interim, reinstated the Department’s previously enacted 1987 rule defining the term. *Id.* at 13.

The Well Drillers and Realtors, who had intervened in the district court proceeding, filed coordinated but separate appeals of the district court’s order. Doc. 53. The Department elected not to appeal. The Department’s ability to do

*Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, ¶ 10, 311 Mont. 327, 55 P.3d 396.

**B. The Water Use Act's permitting process.**

Early in Montana's history, a water right could be acquired simply by making use of water and filing a statement of the use with the county clerk. Albert W. Stone, *Montana Water Rights – A New Opportunity*, 34 Mont. L. Rev. 57, 72 (1973). In 1972, the Montana Constitutional Convention recognized the need for improved recordkeeping and regulation. In response, the Convention directed the Montana legislature to provide for "the administration, control, and regulation of water rights and a system of centralized records." Art. IX, § 3 (3), Mont. Const. The Water Use Act was enacted in 1973 to provide for such administration, control, and regulation. § 85-2-101, MCA.

Pursuant to the Act, and subject to specific exceptions, anyone who anticipates appropriating more than 35 gpm and 10 afy of groundwater must obtain a water permit from the Department. § 85-2-301, MCA; § 85-2-306, MCA. The applicant for a water right must prove that specific criteria – known as the "311 criteria"—are met, including that water is legally and physically available (this includes identification of existing demands), that the use is beneficial, and that the new appropriation will not adversely affect senior water rights. § 85-2-311, MCA.

Geology, put the new well to beneficial use, and submit a notice of completion along with \$125 to the Department. *See* AR 2. The priority date for exempt wells is the date the Department receives the notice of completion. The Department “automatically” grants water rights for exempt wells if the well is complete and the water has been put to beneficial use. *Id.* at 11.

**D. Combined appropriations.**

The exempt well provision’s fast track for small wells does not apply to a “combined appropriation from the same source from two or more wells or developed springs” that exceeds 10 afy. § 85-2-306(3)(a)(iii), MCA. The Act does not define “combined appropriation.” In 1987—three months after the language was enacted—the Department adopted an administrative rule defining “combined appropriation” as:

[A]n appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the department’s judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a ‘combined appropriation.’ They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the ‘combined appropriation.’

The Realtors maintain the district court should have granted the Department more deference. Generally, an agency's interpretation of its own rule is afforded great weight and the court should defer to that interpretation "unless it is plainly inconsistent with the spirit of the rule." *Clark Fork Coalition*, ¶ 20. But, here, the Department's interpretation is not based on any findings of fact or agency expertise, only conclusions of law. Courts review "agency conclusions of law de novo, to determine if the agency correctly interpreted and applied the law." *Molnar v. Fox*, 2013 MT 132, ¶ 17, 370 Mont. 238, 301 P.3d 824. "In reviewing conclusions of law under § 2-4-704, MCA, we determine whether the agency's interpretation of the law is correct." *Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶ 18, 346 Mont. 507, 198 P.3d 219. This Court must determine whether the Department's 1993 rule defining "combined appropriation" is "consistent and not in conflict with [the Water Use Act] and reasonably necessary to effectuate the purpose of the statute." § 2-4-305(6), MCA. Because it is reviewed *de novo* for correctness, the Department's legal conclusion receives no deference. Deference is not appropriate where "a tribunal arrives at a conclusion of law—the tribunal either correctly or incorrectly applies the law." *Bitterroot River Protective.*, ¶ 18.

Where the meaning of a statute is in doubt, courts have sometimes afforded "respectful consideration" to an agency's interpretation of statute, but only when

narrowly as two or more wells or developed springs that are “physically manifold” or piped together. Indeed, such a definition creates an exempt well “loophole” that allows large consumptive water users to bypass the Act’s permitting requirements, harm senior water rights holders, and adversely impact Montana’s water resources by drilling multiple unconnected wells for the same use, project, or development. This is not what the Montana legislature intended.

After invalidating the Department’s narrow 1993 rule, the district court was well within its broad equitable authority to direct the Department to: (a) initiate further rulemaking consistent with its order; and (b) reinstate the previous, legally-enacted rule defining “combined appropriation” in the interim, pending completion of new rulemaking.

## ARGUMENT

### **A. The Department’s rule defining “combined appropriation” conflicts with the Water Use Act.**

A court’s purpose in construing a statute is “to ascertain the legislative intent and give effect to the legislative will.” *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426. The Department’s 1993 rule conflicts with legislative intent.

#### **1. The plain language.**

“[L]egislative intent is to be ascertained, in the first instance, from the plain meaning of the words used.” *Heath*, ¶ 25. The plain language of the Act states a

used and does not use unnecessary or superfluous words. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA.

"Appropriation" is a term of art in water law with a distinct meaning.

"Appropriation" refers to "[t]he amount of water one has the legal right to use for beneficial use. . . . It is most commonly associated with a vested right to use some amount of water for some beneficial purpose under the western United States appropriation doctrine." John W. Johnston, *United States Water Law: An Introduction* 143 (2008). A "combined appropriation," then, is the combined amount of water, added together from multiple diversion mechanisms, that a user has the legal right to apply to a beneficial use.

"Combined" is usually used in reference to quantities (flows and volumes) or abstractions (efforts and values), not to tangible physical items such as chairs, sprinklers, or wells, which are more likely to be connected. The dictionary definition bears out this commonsense reading: to "combine" is to "bring into such close relationship as to obscure individual characters," to "merge," "intermix," "blend," or "unite into a single number or expression." WEBSTER'S NEW COLLEGIATE DICTIONARY 262 (9th ed. 1987).

## 2. The legislative history.

A plain and unambiguous statute must be applied as written. *Bradley v. N. Country Auto & Marine*, 2000 MT 81, ¶ 13, 299 Mont. 157, 999 P.2d 308. Here, the language of the statute is plain and unambiguous, so a consideration of legislative history is not necessary. However, to the extent the Court wishes to review it, the legislative history supports the notion that the legislature intended to require permitting for “combined appropriations” from multiple wells regardless of physical connection.

Notably, the Well Drillers and Realtors concede that the legislature’s intent in enacting the “combined appropriation” provision in 1987 was to require permitting for appropriations from two or more wells, regardless of physical connection. *See* WD Br. at 23. This is the beginning and the end of the matter. What matters for this Court’s review is the intent of the legislature that enacted the “combined appropriation” language—the 1987 legislature. “In the construction of a statute, the primary duty of the court is to give effect to the intention of the Legislature in enacting it.” *State v. Hays* (1929), 86 Mont. 58, 282 P.32, 34. This “rule of law” principle ensures that citizens are governed by laws, not by the arbitrary decisions of individual government officers.

As the Well Drillers acknowledge (Br. at 23), the legislative history provides a snapshot of the legislature’s intent to require permitting for large uses, regardless

36. Rep. Spaeth “said that he liked and supported Mr. Doney’s amendment” and two days later – on March 25, 1987 – the Committee moved to adopt Mr. Doney’s amendment. *Id.* at 33, 44. After adopting Mr. Doney’s amendment, “Sen. Keating inquired whether there was question about the word ‘combined’ in the bill and both Ted Doney and Rep. Spaeth replied there was no problem with the word.” *Id.* at 45. Without further discussion, the proposed amendment to HB 642 passed with a unanimous vote. *Id.*

Three months later, the Department published notice of proposed rulemaking defining the term “combined appropriation” in accordance with legislative intent: “‘Combined appropriation’ means an appropriation of water from the same source aquifer by two or more groundwater developments . . . [that] need not be physically connected nor have a common distribution system to be considered a ‘combined appropriation.’” AR 7 at 1, 2. On August 31, 1987, the Department adopted this definition without objection. *Id.* at 2. This is significant, because to the extent deference is appropriate in this case, it should be “accorded to interpretations of an agency made at the time of enactment on the theory that the agency entrusted with the administration of a statute is likely to be well informed about the intent of Congress in enacting it.” *Donovan v. S. California Gas Co.*, 715 F.2d 1405, 1408 (9th Cir. 1983).

“essentially” codified a key portion of the administrative rule. *Id.* By contrast, the “combined appropriation” language at issue in this case, § 85-2-306(3)(a)(iii), MCA, has not been amended. *State ex rel. Lewis & Clark Cty.*, 141 Mont. at 212, 376 P.2d at 1003.

In fact, where amendments have only occurred to neighboring provisions—as here—this Court has dictated a different approach: “[W]here a section or a part of a section is amended, it is not to be considered as having been repealed and re-enacted in its amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted.” *State v. Dawson Cty.* (1930), 87 Mont. 122, 286 P. 125, 131; accord *In re Wilson’s Estate* (1936), 102 Mont. 178, 56 P.2d 733, 738. In other words, a legislature’s intent for a particular provision is to be evaluated as of the time of enactment and amendments to neighboring provisions or language do not disturb this original intent. The Well Drillers, for example, point to the legislature’s 2013 addition of subsection (3)(a)(iv) to § 85-2-306, MCA, addressing exempt wells in stream depletion zones. Br. at 26. As a neighboring provision, however, subsection (3)(a)(iv) has no effect on the construction of subsection (3)(a)(iii), which was not

legislative efforts, including a 2005 bill that defined “combined appropriation” as “[a]ny ground water development consisting of two or more wells or developed springs, regardless of whether their diversion works are physically connected or not, that are developed in connection with a major or minor subdivision.” H.B. 403 (Mont. 2005). The import of these and other failed bills is that nothing can be deduced from the tea leaves and it is not the court’s role to engage in such an exercise. Instead, this Court’s inquiry must be the intent of the 1987 legislature.

The Well Drillers’ final attempt to ignore the 1987 legislature’s intent is also unavailing. The Well Drillers surmise—without support or citation—that the “combined appropriation” language was solely directed at preventing abuse of the exemption by irrigators. Br. at 23. According to the Well Drillers, therefore, the Department’s 1993 rule is consistent with the statute because it effectively prevents the use of “combined appropriations” for irrigated agriculture, since, at the 35 gpm and 10 afy threshold, the only practical way to irrigate with multiple wells is to physically connect them. Br. at 24. The Well Drillers suggest that it “made sense” for the legislature not to require physical connection in order for a “combined appropriation” to qualify for permitting in 1987, when the limit for an exempt well was the relatively high 100 gpm, but that, after the limit for an exempt well was lowered to 10 afy in 1991, it was “logical” for the Department to expand the

the backdrop of the 1987 rule, which specifically provided that wells need not be physically connected to qualify as a combined appropriation.

**3. The overall purpose of the Water Use Act.**

Again, a court's "purpose in construing a statute is to ascertain the legislative intent and give effect to the legislative will." *State v. Heath*, 2004 MT 123, ¶ 24, 321 Mont. 280, 90 P.3d 426 (citing § 1-2-102, MCA). While the words used, "even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing . . . it is one of the surest indexes of mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have a purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 454-55 (1989).

The Well Drillers (Br. at 30) and the Coalition agree that a central purpose of the Water Use Act, as directed by Article IX, section 3 (4) of the Montana Constitution, was to provide for the proper administration, control, and regulation of Montana's water resources by, among other things, establishing a permit system for the appropriation of water. § 85-2-101, MCA. This permit system replaced Montana's former loose appropriation law, which resulted in uncertainty, ignorance of what rights there were in a stream, disputes, and litigation. Albert W.

The amount of water depleted by exempt wells under the Department's 1993 rule is significant. The Department estimates that approximately 22,151 exempt wells diverted about 25,751 acre-feet from 1993-2010 in closed basins alone. Joe Kolman, *The Exemption: To Change or Not to Change*, A Report to the 63rd Legislature by the Water Policy Interim Committee (October 2012) at Appendix B.<sup>5</sup> This amount of diversion is equivalent to 2,575 football fields under 10 feet of water. Stacked one atop another, those football fields would top Denali (at 20,146 feet high). *Id.* The Department estimates the number of exempt wells filed in closed basins in Montana increases steadily "at a rate of approximately 1,400 per year." AR 14 at 6. The total number of exempt wells "will increase by approximately 70,000 from current numbers and an additional 47,000 acre-feet of water will be consumed per year by 2060." *Id.*

The consequences, therefore, of the exempt well loophole created by the Department's narrow definition of "combined appropriation" in its 1993 rule are serious and significant, not just for the Coalition but other senior water rights holders and Montana's precious water resource. As the Department concedes, "100 individual wells serving a subdivision will have the same magnitude of depletion as one or more larger non-exempt wells for a public water system serving the same

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<sup>5</sup> This report is available online at <http://leg.mt.gov/content/Publications/Environmental/2013-exempt-wells.pdf> (last visited on January 12, 2016).

appropriating 40 afy, or four wells, each pumping 25 gpm and 10 afy. The one well has the same effect on depletion of water and on existing rights as the four wells, but only the former must go through permitting. This lopsided treatment makes little sense but is precisely what the 1993 rule allows.

Because the Department's 1993 rule allows large amounts of water to be appropriated for a single project or development—even in closed basins—without having to obtain a water permit, there is no mechanism in place to protect senior water rights holders. In the Department's own words:

[T]here is concern among senior water rights holders that the cumulative effects of many small ground water developments can have significant impacts in terms of reducing ground water levels and surface water flows over the long term, and may be creating the same types of adverse effects that the permitting system was intended to protect them against. This concern is justified not just based on the absence of regulatory review of new development, but also because there is no effective or efficient mechanism for enforcing their senior priority dates against these junior ground water users.

AR 13 at 1; *see also* AR 17 (discussing impacts of subdivision using exempt wells on existing rights); AR 20 (same). “[E]xempt wells can pump water out of priority which in turn reduces the water available to senior water users during the times of water shortages. This concern is elevated as exempt wells are being used for large, relatively dense subdivision development in closed basins.” AR 14 at 1.<sup>6</sup>

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<sup>6</sup> The Well Drillers invite debate about whether, consistent with the statute, a subdivision developer should be required to go through permitting. The Well Drillers point out that only a “person” may be an appropriator, *see* Br. at 33-34,

of demonstrating adverse effect that could jeopardize these prior appropriators' water rights."'). The legislature has spoken clearly in placing the burden of showing adverse effect on applicants for significant new water uses, not on established senior rights holders. Administrative efficiency should not be allowed to trump protection of Montanans' rights—here, the rights of senior water rights holders. *See, e.g., Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 28, 325 Mont. 148, 104 P.3d 445 (rejecting administrative efficiency defense).

Moreover, even assuming, *arguendo*, that it is appropriate to shift the burden from applicants for significant new water uses to senior rights holders, it is incorrect that exempt wells can be “called,” as the Well Drillers claim. Br. at 30. As a practical matter, they cannot. Among other problems, a senior rights holder attempting to call water faces: (a) the difficulty of establishing a causal connection between his senior well and a specific junior well, since all wells contribute to mining the aquifer; (b) a time lag between pumping and its effects on surface flow: by the time the senior user recognizes that a shortage exists, the water may already be gone; (c) the futile call doctrine, which allows a junior to block a call if the hydrological connection between surface water and ground water is unclear; (d) the practical problem that a senior user making a call on a subdivision may be required to make hundreds of calls; and (e) the serious health and safety problems posed by making a call on exempt wells that serve domestic, including drinking water,

developments in already over-appropriated basins, thus spawning difficult problems in which senior rights holders are affected, but the depleting development has already gone in and cannot be dismantled. Headaches for senior rights holders and for the courts can be proactively avoided simply by requiring large water users, with Department oversight, to look before they leap.

The Well Drillers argue that some impacts from multiple wells *could be* addressed by establishing controlled groundwater areas, where no exempt wells are allowed, Br. at 36, but this fact is unhelpful and irrelevant. With this argument, the Well Drillers again ask this Court to transfer the burden of investigating the impact of significant new appropriations from the applicants for new rights, as required by § 85-2-311, MCA, to senior rights holders. To petition for a controlled groundwater area, injured rights holders must band together with one-third of the other rights holders in the area, and must include in their petition expensive and time-consuming analysis by a hydrogeologist, scientist, or engineer. *See* § 85-2-506, MCA. As such, relying on controlled groundwater areas inappropriately shifts the burden to existing water rights holders and does little to fulfill the legislature's intention to use the Water Use Act's permitting process as a proactive tool to prevent problems from occurring in the first instance.

Moreover, in the end, it is irrelevant whether or not other legal mechanisms (like controlled groundwater areas) can be called on to rein in the exempt well

district court. *See* Doc. 27 at 20; Doc. 42 at 18-19. But neither the Well Drillers nor the Realtors responded or objected to this request.

Second, contrary to the Well Drillers' and Realtors' assertions, the district court did not err in directing the Department to conduct further rulemaking consistent with its order. Remanding to an administrative agency for further proceedings consistent with a district court opinion is common practice. Indeed, the "law of the case" doctrine requires that a trial court conform any further proceedings on remand to the principles set forth in an appellate opinion. *See Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948). This rule applies equally to administrative agencies as they comply with a reviewing court's opinion. *Fed. Power Comm'n v. Pac. Power & Light Co.*, 307 U.S. 156, 160 (1939).

Traditionally, courts performing their review function rely heavily on some form of remand, including remand for further proceedings, remand with instruction, and vacate and remand. 33 Charles Alan Wright, Charles H. Koch, Jr., *Federal Practice and Procedure* § 3637 (1st ed. 2015). And, on remand, the agency is bound to follow the explicit instructions of the court. *Id.* This Court follows this practice. For example, in *Montana Trout Unlimited v. DNRC*, this Court invalidated a Department rule, finding it inconsistent with legislative intent—just as the district court did here. 2006 MT 72, ¶ 43, 331 Mont. 483, 133

new definition of “combined appropriation” that is neither too narrow (like the 1993 rule) nor too broad.

How the Department ultimately decides to define “combined appropriation” in accordance with legislative intent is an important issue and one that interested parties will surely be involved in. But the scope and content of a future rule—whatever it may be—does not change the fact that the 1993 rule defining “combined appropriation” solely as two or more wells that are “physically manifold” together is too narrow, in conflict with legislative intent, and needs to be changed. The Coalition agrees that there should be meaningful public participation during the rulemaking process. Nothing in the district court’s order, however, restricts or limits such participation. The district court simply clarified the bounds of the statute and directed the Department to act within those bounds.

Third, the Well Drillers’ and Realtors’ assertion that the district court erred in reinstating the prior (1987) rule defining “combined appropriation” in the interim, pending completion of rulemaking, is also incorrect.

Pursuant to § 2-4-704(2), MCA, this Court may “reverse or modify” the Department’s declaratory ruling if it is in violation of statutory provisions, in excess of statutory authority, or clearly erroneous.” This Court may also issue other forms of relief provided by statute. *See* § 2-4-702(1)(a), MCA (“This section does not limit the use of or the scope of judicial review available under other

Typically, when a court reverses an agency, the legal status reverts back to the *status quo ante* unless and until the agency conducts a new proceeding on remand. Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.13 (5th ed. 2010). Thus, while the court in its equitable discretion may opt to take a different course, as a general matter, “[t]he effect of invalidating an agency rule is to reinstate the rule previously in force.” *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). The “common rationale” supporting the reinstatement of a prior rule after invalidation of a current rule “is that the current rule being invalid from its inception, the prior regulation is reinstated until validly rescinded or replaced.” *Cumberland Med. Ctr. v. Sec’y of Health and Human Svcs.*, 781 F.2d 536, 538 (6th Cir.1986).


This logic has been echoed by this Court in the context of statutes: “It is well settled that an unconstitutional statute enacted to take the place of a prior statute does not affect the prior statute.” *Application of O’Sullivan* (1945), 117 Mont. 295, 304, 158 P.2d 306, 310 (citing cases). This Court has also recognized, in *dicta*, that the reinstatement of a prior agency rule is appropriate after invalidation of a current rule. In the context of a mootness issue, this Court observed that, if the district court on remand determined that certain administrative rule amendments were invalid, it must then determine whether the previous version of the rules should be revived. *Missoula City-Cty. Air Pollution Control Bd. v. Bd. of Env’tl. Review*


interim rules drafted and adopted without notice-and-comment rulemaking have been upheld where the interim rule is designed to eliminate the problems identified by the court. *Mid-Tex Elec. Co-op., Inc. v. F.E.R.C.*, 822 F.2d 1123, 1130 (D.C. Cir. 1987). But here, the 1987 rule was both appropriately adopted through notice-and-comment rulemaking and eliminates the problem identified by the district court. See AR 7 at 1, 2. The district court's choice to reinstate the rule pending completion of new rulemaking was therefore appropriate and should be upheld.

### CONCLUSION

Wherefore, the Coalition respectfully requests this Court affirm the District Court's October 17, 2014 order (Doc. 53).

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Petitioners/Appellees the Clark Fork Coalition et al. was served upon the following on January 15, 2016, via U.S.

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